IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 216 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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NALINIBEN L PATEL

Versus

HEIRS OF JASHODABEN C PATEL

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Appearance:

MRS KETTY A MEHTA for Petitioner

MR RN SHAH for Respondent No. 2

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 23/06/2000

ORAL JUDGEMENT

Plaintiff Naliniben is the daughter of one Laxmandas Maganlal Patel who died in Ahmedabad on 1.3.1976. She filed civil Miscellaneous Application No. 28 of 1977 on 24.12.1976 for obtaining probate of the Will which according to her was executed by the said

Laxmandas on 20.10.1971 and 5.12.1971. Laxmandas died leaving behind him his widow named Jiviben, three daughters, named Jashodaben and Kantaben who were original opponents no. 1 and 2 and the applicant Naliniben and two sons named Chimanlal and Jayantilal. Jiviben died on 30.4.1976. Chimanlal died on 28.8.76. Jayantilal is residing in America since many years. Jashodaben and Kantaben resisted the said application for probate and upon caveat being filed the said Miscellaneous Application came to be converted to the present suit being number 2963 of 1978. It was asserted by the applicant that the will was executed in the presence of attesting witnesses named therein and she happened to be beneficiary under the Will in so far as the properties shown in the schedule are concerned. The properties described in the Will were bequeathed to her and Laxmandas appointed Chimanlal as the "Vahivatdar" (Administrator ) of the properties.

Original opponent no. 1 Jashodaben died during the pendency of the suit but contested the probate application as per her written statement Exh. 26 alleging that Laxmandas never executed such Will as alleged in the petition, that she did not sign the Will as attesting witness and, that the deceased Laxmandas did not have any right or authority to dispose of the properties in question by Will. Opponent no. 2 Kantaben filed written statement Exh. 19 with similar assertions.

The learned trial judge framed following issues at Exh. 24.

1) Is it proved that the deceased Laxmandas Maganlal Patel executed Will on 20.10.71 and 5.12.71 in a sound state of mind and whether the alleged Will was legally and validly executed?

2) Whether the deceased Laxmandas had right and authority to execute the Will in respect of the suit properties?

3) Whether the plaintiff is entitled to probate asked for by her?

4) What decree and order?

Since the learned trial judge found that the applicant failed to prove the execution of the Will in question, the other issues did not survive and the

probate application was liable to be dismissed. It was accordingly dismissed with no order as to costs. That is how the appellant is before this Court in this First Appeal.

This appeal having come up for final hearing has been heard. Learned counsel Mrs. K.A. Mehta submitted that Laxmandas executed the Will in question in sound disposing state of mind after fully understanding the same. In order to make good this submission, she read before this court the evidence as also the observations of the learned trial judge. Mr RN Shah learned advocate for the respondents submitted that upon appreciation of the evidence the finding of the learned trial judge about the execution of the Will in question in sound disposing state of mind by deceased Laxmandas Maganlal Patel would merit acceptance. The submissions essentially arise from the appreciation of the evidence as also the observations of the learned trial judge.

It has been submitted that there was no reason for the learned trial judge to disbelieve the oral evidence of the petitioner. In fact, a very important fact which has been brought to light in cross-examination of the applicant clearly appears to have escaped the attention of the learned trial judge. It would, therefore, be appropriate to deal with the oral evidence of Naliniben Laxmandas Patel, the applicant. She was examined at Ex. 25. She has deposed to the extent of family and the facts with regard to their existing state of placement. The same need not be repeated as it appears in the opening part of this judgment. What is important is that when Laxmandas executed the Will, she was present on 20.10. 71. She was residing in the suit house located at Raipur, Bhauvni Pole. She and her mother were staying with Laxmandas in the said house. Over and above both of them, her brother Chimanlal was also present. Her two sisters were not present, however, their signatures were taken in the will subsequently. She has accordingly asserted that the Will produced with list exh. 21 came to be executed on 5.12.71 by her father. Both the signatures ( first one as on 20.10.71 and the second one as on 5.12.71 ) were affixed in the presence of the applicant and the second signature as on 5.12.71 was affixed by her father in presence of two witnesses who attested the Will on that date. She has deposed that her father executed the Will of his own volition and without any pressure from anyone. She also frankly admitted that the properties in respect of which the Will was executed originally belonged to her father's father i.e. her Grand Father and that is how they were

the ancestral properties. It has also come in evidence that she is unmarried, she is not following any occupation, she is lame and, that she was unable to marry due to such disability. In her cross-examination, it has also appeared that the applicant studied upto Vth standard and at the time of execution of the Will, she was aged about 22 years. The facts which have been disclosed in the cross-examination of this witness and which appear to have escaped the attention of the learned trial judge are that applicant's brother and father (testator)went to give instruction for drafting the Will to the advocate and her brother Chimanlal was appointed Executor of the Will. Rest of the cross-examination has been dealt with by the learned trial judge. Pausing here for a moment, it has to be noted from the aforesaid facts disclosed in the cross-examination that the testator had himself the occasion to give instructions for drafting the Will to the learned advocate. If that was so, it can hardly lie in the mouth of anybody that he did not have the occasion to execute the will in sound disposing state of mind without knowing and/or understanding the contents thereof.

The learned trial judge has observed that it is not established that two attesting witnesses put their signatures at the instance of testator or that the witnesses have seen the testator putting his signatures. It has been observed that it was not known on what date Laxmandas had put his first signature, although, under the second signature, there was mention of date 5.12.71. Observing further on the tenor of the Will, the learned trial judge has noted that Kantaben's first signature bears the date 9.11.1971 and Jashoda's first signature bears the date 15.11.71 and, thereafter the signatures of both of them are under date 5.12.71. However, dealing with the evidence of the applicant, it has been observed that two attesting witnesses could not be said to have attested the Will at the instance of the testator or that they had seen the testator signing the Will. In my considered opinion on the further observations made in the impugned judgment itself from the evidence of the opponent, it might be noted that attesting witnesses did sign the Will although initially in the written statement they denied their signatures. The circumstances that the petitioner's two brothers as also the petitioner's mother never had any occasion to contest the Will, in fact, they supported the execution of the Will, speak volume about the genuineness of the Will. It is not in dispute that other two daughters namely the opponents used to visit their father, the testator, at the aforesaid residential

house. If that be so, it would be quite natural for the testator to have waited for them to attest the Will. The two signatures of the testators and the two signatures of the witnesses go to explain this situation. The tenor of the signatures would further indicate that since the two witnesses had two different occasions to attest the Will, the testator might have thought it fit to sign once again when both of the daughters, the attesting witnesses, were present. This would lead further assurance to the execution of the Will by the testator in presence of the attesting witnesses, who had signed for having truly attested the Will. The tenor of the signatures would further indicate that the deceased was out for execution of Will in a manner that the same might not be challenged or contested, possibly by the two married daughters,who were well placed in their life. To the credit of the learned trial judge, it might be noted that on comparison of the signatures of the attesting witnesses and on consideration of number of circumstances, the learned trial judge has proceeded to believe the applicant's case that the Will in question contained signatures of the opponents as the witnesses. Now therefore, if there was a little variation in the evidence of the applicant with regard to whether Laxmandas himself asked Kantaben and Jashodaben to sign as attesting witnesses , it could not be said that there is any defect in the attestation of the Will.

As a matter of fact, there is no suspicious circumstance which would go to generate doubt about the execution of the Will by Laxmandas. In contrast, there are favourable circumstances for holding that it was quite natural for Laxmandas to execute the Will bequeathing the properties particularized in the Will to the petitioner, who was handicapped, unemployed and unmarried daughter. The finding of the learned trial judge that the evidence of the applicant would fall short of proving the execution of the Will and would fall short of proving the facts as required to be proved under Sec. 63 of the Indian Succession Act, with respect, cannot be accepted. It is well settled that a Will contains the last desire of testator. The Courts, therefore, normally act in accordance with the wishes of the person concerned.However, if the Will is surrounded by suspicious circumstances, the removal of which is the burden of the propounder, the Will would not be probated. Rabindra Nath Mukherjee and anr. vs. Panchanan Banerjee (dead) by L.Rs. & Ors., reported in AIR 1995 SC 1684. In the present case, there are no suspicious circumstances. Instead, the circumstances go to support the stand of the petitioner, as stated above.

Issue No. 1 as noted hereinabove shall have, therefore, to be held proved and answered in the affirmative.

Issue No. 2 related to the right and authority of deceased Laxmandas to execute the Will in respect of the suit properties. The properties described in the Will are; (1) residential house particularized in the Will and situated at Raipur, Bhauvni Pole, and; (2) house situated at Vadnagar, Tal. Kheralu, District Mehsana as particularized in the Will coupled with whatever movables that might be left out. It is no doubt true that the petitioner has admitted that these are the ancestral properties in which deceased had merely coparcenary interest alongwith his two sons namely Chimanlal and Jayantilal. Apart from the fact that the evidence indicates that one of the sons accompanied the testator for giving instructions to the advocate for drafting the Will, section 30 of the Hindu Succession Act, 1966, clearly enables a Hindu to dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus. The explanation to the above provision would read as under:

> "The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarvad, tavazhi, illom, kutumba or kavaru in the property of the tarvad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

The aforesaid explanation, now clearly enables a male Hindu to dispose of his interest in a Mitakshara coparcenary property. Simply because the deceased described the property in question to be his self acquired property, it cannot be said that he cannot dispose of his interest in such property in case it is found that he has interest in such property by virtue of the fact that he happened to be a coparcener with his two sons. The intention of the testator is very clear when he wanted to bequeath the property in question in favour of the applicant. It can, therefore, hardly be said that

he did not have the intention to bequeath his interest as a coparcener in the said property, in case, it is found to be coparcenary property. It is, therefore, clear that the bequest would take effect to the extent of undivided interest/share of the deceased in the property in question. In view of the aforesaid legal provision, issue no. 2 shall have to be held in favour of the applicant as under;

Deceased Laxmandas had right and authority to execute the will as coparcener to the extent of his interest in the suit property.

In the result, issue no. 3 shall have to be answered in the affirmative holding that the applicant-plaintiff would be entitled to probate as stated above.

In so far as the passing of the decree and order is concerned, grant of probate in favour of the applicant shall have to be made and the matter is accordingly remitted to the trial court for passing appropriate orders of issuance of probate in accordance with law and the provisions of Ahmedabad City Civil Courts Rules. This appeal is accordingly allowed with no order as to costs.

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